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No. 94-989

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SAM BROWN COMPANY,
Petitioner,
v.
JACOBS MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

LOEB H. GRANOFF *
1000 Plaza West Building
4600 Madison Avenue
Kansas City, Missouri 64112
(816) 561-4440

EDWARD R. SPALTY
JERALD S. MEYER
ARMSTRONG, TEASDALE, SCHLAFLY & DAVIS
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420
Attorneys for Petitioner

* Counsel of Record

Of Counsel:
ROBERT H. MNOOKIN
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-9201

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. THE CASES JACOBS CITES, INCLUDING *CHATTEM, INC. v. BAILEY*, CONFIRM THE SHARP CONFLICT AMONG THE FEDERAL CIRCUITS WITH REGARD TO THE DATE FROM WHICH POSTJUDGMENT INTEREST RUNS.

Jacobs would have this Court believe that there is no conflict among the federal circuits concerning the proper legal standard for the allowance of postjudgment interest and that all the circuits apply essentially the same legal standard—one that confers on courts of appeals virtually

unfettered discretion to deny or allow interest on a case-by-case basis. One has only to read the relevant appellate decisions, however, to see that there is a profound conflict and that, contrary to Jacobs' assertion, the various circuits apply different and irreconcilable legal standards.

SBC is asking the Court to resolve this sharp conflict because it is a matter of substantial importance to the administration of justice. Specifically, what legal standard should a court of appeals apply when determining the date from which postjudgment interest runs upon reversal of an erroneous JAML (formerly judgment n.o.v.) and the reinstatement of an original jury verdict for money damages?

Some federal circuits, like the Second Circuit, suggest that appellate courts have very broad "discretion to decide the [computation of interest] issue on a case-by-case basis," depending essentially on the evidentiary facts and circumstances. *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 473 (2d Cir. 1988). But other circuits apply very different legal standards, ones that presume that such interest ordinarily runs from the date of the original judgment. *See, DeLong Equipment v. Washington Mills Electro*, 997 F.2d 1340 (11th Cir. 1993), *cert. denied*, 510 U.S. ——, 114 S.Ct. 604, 126 L.Ed.2d 569 (1993) [on an unrelated issue]; *Cordero v. De Jesus-Mendez*, 922 F.2d 11 (1st Cir. 1990). Indeed, the Eleventh Circuit held that, when a judgment n.o.v. is reversed and a jury verdict is reinstated, absent an award of postjudgment interest from the date of the original money judgment, the integrity of the verdict would be impugned, and its value diminished, with serious Seventh Amendment implications. *DeLong*, 997 F.2d at 1342.

Chattem, Inc. v. Bailey, 838 F.2d 149 (6th Cir. 1988), *cert. denied*, 486 U.S. 1059, 108 S.Ct. 2831, 100 L.Ed.2d 931 (1988), which Jacobs cites, only underscores the conflict among the circuits. Resp. Br. 7, 12. In his dissent to the Court's denial of certiorari, Justice White noted

in *Chattem*, 486 U.S. at 1059, 108 S.Ct. at 2831, 100 L.Ed.2d at 931-932:

> The question here is . . . what date should be used when calculating an award of postjudgment interest: the date of the first judgment for the plaintiff or the date of the later award?
>
> . . .
>
> *Because this case presents a conflict among the Circuits over the proper application of an oft-used federal statute (28 USC § 1961 [28 USCS § 1961]), I would grant the petition for certiorari.* Italics supplied.

Unlike this case, *Chattem* involved a much more complicated procedural history. In *Chattem* there was an initial judgment for $400,000 entered after a jury verdict, *not* a judgment n.o.v., that was reversed on appeal. After a new jury trial, a larger second jury verdict was returned, one for $650,000, that was later affirmed. Although the appellate court affirmed the district court's allowance of postjudgment interest on the first $400,000 from the date of the original judgment, it directed that interest on the remainder be computed from the date of the judgment entered after the second jury trial. Clearly, the denial of certiorari in *Chattem* is of no precedential value, not to mention the entirely different circumstances that were involved. *See, Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-918, 70 S.Ct. 252, 254-255, 94 L.Ed. 562, 565-566 (1950). It could have been for any number of reasons unrelated to the merit of the issues, including the fact that a convoluted procedural history was presented, one involving two separate jury trials that resulted in different monetary awards.

Just as Justice White confirmed the irreconcilable conflict among the federal circuits in *Chattem*, so too do the other cases cited by Jacobs. For example, contrary to the Fifth Circuit in *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706 (5th Cir. 1986), the Third Cir-

cuit stated in *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 98 (3rd Cir. 1993):

> [I]f the original judgment is affirmed in whole, *such as where the court of appeals reverses the district court's grant of judgment n.o.v. and orders the original judgment reinstated in its entirety*, postjudgment interest *will* accrue from the date of the first judgment. *See, e.g., Northrop Corp. v. Triad Int'l Mktg., S.A.*, 842 F.2d 1154, 1156 (9th Cir. 1988). Italics supplied.

Jacobs mischaracterizes *Loughman*, just as it does *DeLong Equipment v. Washington Mills Electro, supra*, 997 F.2d 1340, when it insists there is no conflict among the circuits. Resp. Br. 11. If there were, it would no doubt come as a shock to the Eleventh Circuit, which ruled in *DeLong, id.* at 1343:

> *Having held that the jury's verdict was supported by the evidence, we will not undermine it by refusing to grant DeLong the interest necessary to sustain its value. To the extent that the Affiliated Capital case is inconsistent with this view, we disagree with it.* While Rule 37 allows an appellate court to select an appropriate date from which interest should run, we do not think this power would allow us, *in a case reinstating a jury verdict on grounds that the jury was correct*, to refuse to grant interest from the date judgment would have been entered in the plaintiff's favor if the district court had not erred. Italics supplied.

Quoting *Buck v. Burton*, 768 F.2d 285, 287 (8th Cir. 1985) out of context, Jacobs insists (Resp. Br. 15) that *Buck* and *Affiliated* are consistent when in fact they are irreconcilable. Contrary to Jacobs' suggestion, "[t]he equities of the situation" referred to in *Buck*, 768 F.2d at 287, had nothing to do with the evidentairy record at all, only the *procedural* posture of the case. As the *Buck* court stated in the two sentences immediately preceding Jacobs' misleading quotation, 768 F.2d at 286:

> "Where judgment is entered promptly on the verdict, section 1961 ensures . . . that the plaintiff is compensated for being deprived of the monetary value of the loss from the date of ascertainment of damages until payment by defendant." . . . When the initial ascertainment of damages is upheld, as in this case, by the reversal of a judgment n.o.v., "but a delay occurs between the date of that ascertainment and the date of the eventual entry of judgment based on that ascertainment, the result [under section 1961] should not differ."

In essence Jacobs argues, since the Court of Appeals reinstated a jury verdict in SBC's favor that included punitive as well as compensatory damages, that a court of appeals should have "discretion" to deny postjudgment interest without giving any reason or including any instructions whatever in its mandate with respect to the allowance of interest. What Jacobs fails to explain is why.

Had the district court not erred in granting Jacobs' motion for JAML, and SBC's original money judgment been affirmed which of course it would have been, even Jacobs admits (Resp. Br. 8) that 28 U.S.C. § 1961(a) would have required the assessment of postjudgment interest from the date of SBC's original money judgment, September 12, 1990, *not* October 25, 1994, the date that SBC's jury verdict was reinstated and a second money judgment was entered for *precisely* the same amount pursuant to the Eighth Circuit's Mandate. Here the district court committed error and was reversed outright. And yet, only because of the Eighth Circuit's flawed Mandate, SBC has been stripped of $2 million in postjudgment interest without even an explanation why.

There simply can be no doubt that if the question presented had been decided in the First, Seventh, Eleventh or, until now, even the Eighth Circuit, this never could have happened. The reason is plain. "In cases such as this one, which reinstate a jury verdict . . . equity ordinarily, *and perhaps always*, commands that interest be

awarded from the date of the original judgment" in order "to protect the integrity of [a] jury verdict" and thus avoid what "might [otherwise be] a serious Seventh Amendment claim." *DeLong Equipment v. Washington Mills Electro*, 997 F.2d at 1341.*

II. THIS COURT SHOULD REQUIRE A COURT OF APPEALS TO INCLUDE EXPLICIT INSTRUCTIONS IN ITS MANDATE WITH RESPECT TO THE ALLOWANCE OF INTEREST, A QUESTION JACOBS FAILS TO ADDRESS, UPON REVERSAL OF A DISTRICT COURT AND REINSTATEMENT OF A JURY VERDICT AWARDING MONEY DAMAGES.

Jacobs fails even to address the other question presented by SBC's Petition, namely, whether upon timely motion an appellate court *must* amend its mandate to *explicitly* include instructions with respect to the allowance of interest. The Court of Appeals here, as even Jacobs concedes, "declin[ed] to amend its mandate" (Resp. Br. 11), even though F.R.A.P. Rule 37, 28 U.S.C.A., affirmatively commands that "[i]f a judgment is . . . reversed . . ., the mandate *shall* contain instructions with respect to the allowance of interest." Resp. Br. 2. Jacobs' silence on this unresolved issue speaks volumes.

Even were this Court to embrace the broad discretionary standard for postjudgment interest that Jacobs argues, the fact remains that the Eighth Circuit failed, even upon SBC's timely motion, to comply with Rule 37. Thus, its one-line Order denying SBC's motion to amend its Mandate, no reason given, not only impugns "the integrity of [a] jury verdict," to paraphrase *DeLong*, but makes it

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* Even before *DeLong*, where less than two years ago the Eleventh Circuit rejected the Fifth Circuit's view in *Affiliated*, another case cited by Jacobs acknowledged the sharp conflict among the circuits. *See, Brown & Williamson Tobacco Corp. v. Jacobson*, 9 Fed.R.Serv. 3d 630, 631-632, —— F.2d —— (7th Cir. 1987).

plain that SBC has "a serious Seventh Amendment claim," *id.* 997 F.2d at 1342, that only this Court can resolve.

CONCLUSION

For all of the reasons stated in SBC's Petition and this Reply, a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be issued.

Respectfully submitted,

LOEB H. GRANOFF *
1000 Plaza West Building
4600 Madison Avenue
Kansas City, Missouri 64112
(816) 561-4440

EDWARD R. SPALTY
JERALD S. MEYER
ARMSTRONG, TEASDALE,
SCHLAFLY & DAVIS
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420
Attorneys for Petitioner

* Counsel of Record

Of Counsel:
ROBERT H. MNOOKIN
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-9201

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